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# Supreme Court of the United States.

OCTOBER TERM, 1929.

No. ~~284~~ 57

STORY PARCHMENT COMPANY,
PETITIONER,
*v.*
THE PATERSON PARCHMENT PAPER COMPANY AND KALAMAZOO VEGETABLE PARCHMENT COMPANY.

PETITION FOR WRIT OF CERTIORARI.

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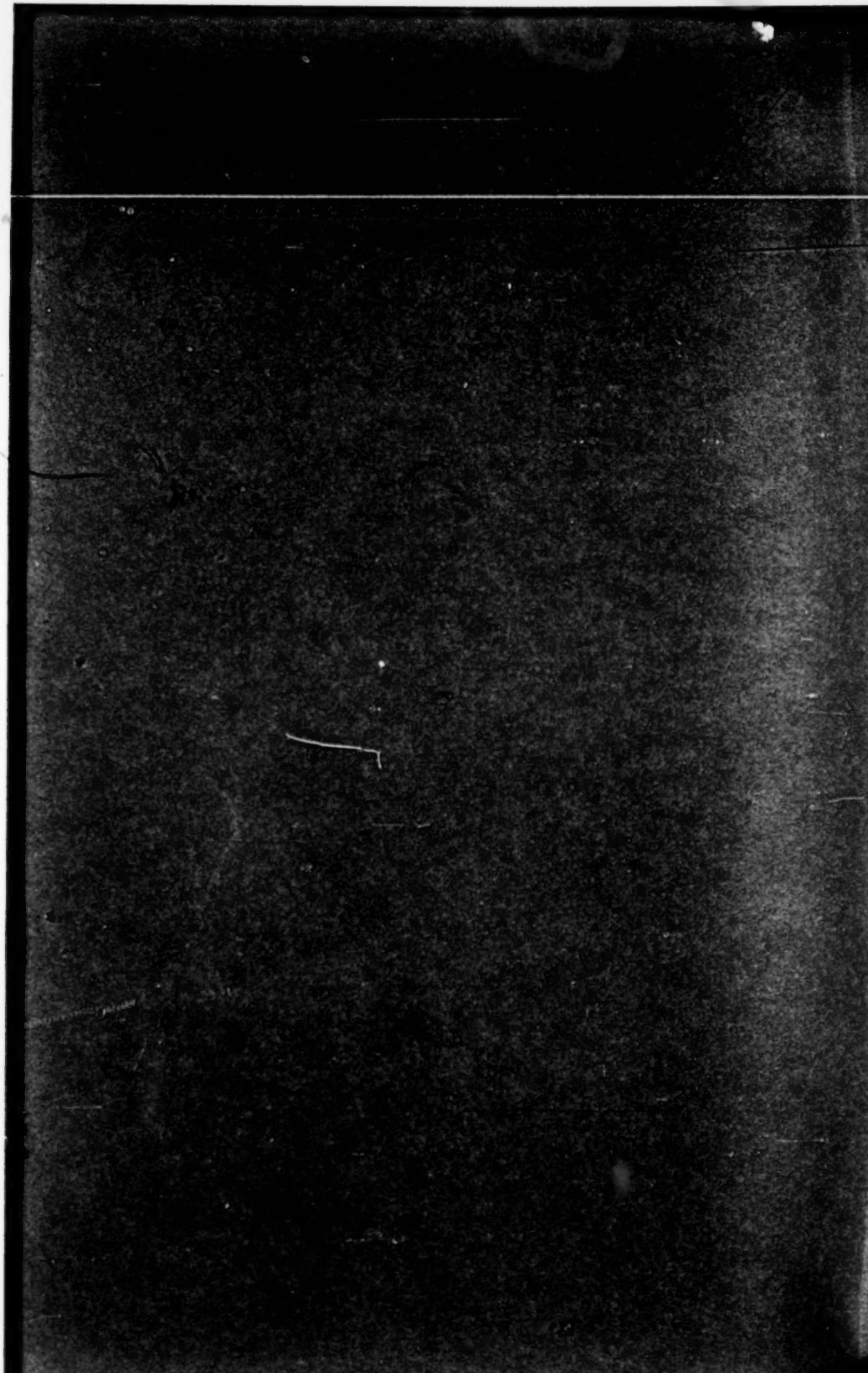

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## PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Story Parchment Company respectfully shows as follows:

### SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The petitioner was the plaintiff and the respondents were the defendants in an action under the Anti-Trust laws of the United States in the District Court of the United States for the District of Massachusetts, in which the jury returned a verdict for the plaintiff in the sum of sixty-five thousand dollars. Judgment was for threefold these damages and costs. The Circuit Court of Appeals for the First Circuit, on January 23, 1930, ordered that the judgment of the District Court be vacated, and the case remanded with directions to enter judgment for the defendants, with costs in both courts.

The Court unanimously agreed that there was evidence of a conspiracy to maintain a monopoly and of concerted action to fix prices, in which the defendants participated. The majority, however, held—Judge Anderson dissenting—

that the plaintiff was not entitled to recover because the evidence failed to show that the conspiracy resulted in damage to the plaintiff to any measurable extent or degree.

The plaintiff was a corporation organized in 1927 to manufacture and sell vegetable parchment, a paper principally used as a protective wrapper for food-stuffs. It carried on business from November, 1927, until June, 1928.

For many years prior to the organization of the plaintiff the defendants and the West Carrollton Parchment Company (not joined as a party to the suit for lack of jurisdiction) had been the only producers of vegetable parchment in this country, and had combined to restrict competition and to maintain uniform prices for their product, so that they enjoyed a practical monopoly of trade and commerce in vegetable parchment among the several states.

The entry of the plaintiff into competition in that commodity threatened to terminate that monopoly.

The defendants and West Carrollton Parchment Company thereupon conspired to maintain their monopoly, and to prevent the plaintiff from acquiring any part of the trade and commerce in vegetable parchment. Pursuant to the conspiracy, and as one means of accomplishing its purpose, they initiated and carried on a price war against the plaintiff, in which, acting in concert, they simultaneously reduced their prices from time to time to figures which were not only below fair and reasonable prices but even below cost for their product.

The conspiracy was successful, and the plaintiff was compelled, as a result of the conditions in the trade which the combination had created, to cease carrying on business.

During the period in which the plaintiff was engaged in trade and made sales of its products it was compelled, in order to carry on business, to sell at the reduced prices which the combination had fixed. Its revenue was thereby diminished below the amount which it would have received for its products at fair and reasonable prices.

Moreover, when the plaintiff was forced to retire from business it had on its hands a plant which it had acquired and equipped for the manufacture of vegetable parchment. Much of its equipment was of no value for any other purpose. By reason of the existence of the defendants' monopoly and the general knowledge in the trade of its effect upon the plaintiff's business, the sale of the plant as a going concern became impracticable. Its value disassembled was much less. The value of the plaintiff's plant was thereby depreciated.

In the District Court the plaintiff claimed that it had been damaged by the defendants' wrongful conduct, both in its property and in its business; in its property, in that it had been compelled to sell its product at the unreasonable prices fixed by the combination, and in that it had been prevented from making that use of its plant and equipment for which it had been designed and which as a result was depreciated in value; and in its business, in that it had been prevented from acquiring trade in parchment at fair and reasonable prices yielding a profit, as it would otherwise have done. The District Court, however, instructed the jury that "in this case nothing should be allowed for profits on the sales which might have been made if there had been no unlawful interference with the plaintiff's business, because we have here no history of the operations of the company, no facts upon which you could base an estimate of what these profits might have been" (R. 600). The case, therefore, went to the jury solely on the two items of damage to the plaintiff's property referred to above.

The decision of the Circuit Court of Appeals concedes that these items of damage, if shown to have been caused to any measurable extent or degree by wrongful conduct of the defendants, are recoverable, and that the facts hereinabove summarized were shown. The opinion of the majority is that, nevertheless, the plaintiff failed in its proof.

*Diminution in revenue.* With reference to the plaintiff's contention that it was entitled to recover the difference between the amounts for which it sold its products and those which it would have realized at fair and reasonable prices, there being evidence that the prices current in November, 1927, were fair and reasonable, the majority say:

> "The error in the plaintiff's contention is the assumption that, but for the alleged unlawful conspiracy of the defendants with the Carrollton Company, the prices current in November, 1927, would have continued to prevail, assuming them to be fair and reasonable. . . .
>
> "Individuals may in competition lawfully reduce prices below a fair and reasonable level. . . .
>
> ". . . free competition between individuals to gain trade may always reduce or keep prices below what is fair and reasonable . . ." (R. 618).
>
> ". . . it is, we think, a moral certainty that, according to Nature's first law, each of the three old companies, if no combination had existed, in order to hold their trade would at least have met every reduction in price made by the plaintiff to gain trade, if they did not openly reduce their prices below the prices fixed by the plaintiff, as independently they lawfully could do. That the defendants would, independently of each other, act upon this rule of self-preservation, is not mere conjecture, but a rule of action of which the courts often take cognizance" (R. 619).
>
> ". . . the plaintiff, even if there had been no unlawful combination by the defendants, did not have a broad, open market in which to dispose of its produce. Without any such unlawful interference, it would have been compelled to dispose of its product in the same restricted market,* which the old companies were al-

* The Court clearly cannot have meant, by the words "restricted market," that the number of buyers in the market for parchment was limited. The wide

> ready fully supplying, and to meet any prices the old companies individually saw fit to make. Nothing could be more certain than that each of the old companies would in any event use every lawful means to retain their own trade as against the new competitor; and nothing more conjectural than the result" (R. 620).

Their conclusion was that:

> "The plaintiff has not, therefore, sustained the burden of proving that it has suffered any measurable damage from the reduced prices at which it was compelled to sell its product by reason of the alleged unlawful conspiracy of the defendants . . ."

Where the opinion refers to the "assumption" by the plaintiff that, but for the conspiracy, the prices current in November, 1927, would have continued to prevail, it is clear that the assumption intended to be described is only one that there was evidence for the jury of the facts contained therein, for the question was submitted to the jury under appropriate instructions:

> ". . . if you are satisfied that this price would have been maintained, would not have changed by reason of any economic condition, if it would have been maintained except for the unlawful acts of the defendants, if you find they did commit unlawful acts . . ." (R. 601).

Indeed, the majority manifestly thought not only that the jury could not have found that the prices current in November, 1927, or fair and reasonable prices, would

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demand for the commodity was undisputed. *E.g.*, Kindleberger, president of the defendant Kalamazoo Vegetable Parchment Company, testified: "Their customers are all over the United States and a little abroad, including the dairy industry, meat packers, ice cream manufacturers, celery washers, poultry packers, retail groceries and meat markets, preserving manufacturers, soap manufacturers and other minor industries" (R. 518).

have prevailed during the period of the plaintiff's competition, but that it was "a moral certainty" "according to Nature's first law" that the defendants and West Carrollton Parchment Company, in the absence of a conspiracy, would have made substantially identical reductions in price, independently, and therefore lawfully.

Upon this view of the facts, the majority of the Court conclude that the plaintiff could have suffered no measurable damage, since, *as they assume*, no damage is caused by acts pursuant to an unlawful conspiracy where the same damage would otherwise have been caused by the same acts independently and therefore lawfully done.

*Depreciation in value of the plant and equipment.* The opinion of the Circuit Court of Appeals concedes that there was evidence of a depreciation in value of the plaintiff's plant and equipment, and that, if that depreciation were caused by unlawful acts of the conspirators, the defendants would be liable for that damage. But the majority assert that the failure of the plaintiff's business and the subsequent depreciation in value of its plant was not caused by the conspirators, but was "inevitable either from lack of capital or inefficient management, or both."*

Here again the decision assumes the "moral certainty" that conditions in the trade would not have been substantially different had there been no conspiracy, and that the

* The majority opinion (p. 8) refers to certain figures in evidence, and from these concludes: "Unless its stock on hand of about $8,000, and its bills receivable largely exceeded its bills payable, other than those above mentioned, which is not a reasonable inference from the testimony, its assets in eight months of operation had shrunk more than $100,000" (R. 620). The balance sheets themselves were not in evidence, and it did not occur to the Court that cash in hand and in banks, supplies, and inventories other than finished inventory, reserves, and prepaid expenses, would affect this calculation. Moreover, the figure of about $8000 for stock on hand was as of the last of October, 1928 (R. 577), four months after the company had ceased to manufacture and to incur any substantial expense, and the Court did not know the amount of the bills receivable. The Court could not know that they did not largely exceed the bills payable other than those mentioned, as in fact they did.

defendants are, therefore, not responsible for the actual conditions which, admittedly, they conspired to bring about for the purpose of destroying the plaintiff's competition.

*Directions to enter judgment for the defendants.* It is obvious that the carrying on of a price-cutting war against the plaintiff by the three old companies in order to maintain their monopoly must have resulted in some damage to the plaintiff, even though, as the majority opinion holds, the evidence was insufficient to show damage "which can be measured and expressed in figures that are not based on speculation and conjecture" (R. 616).

The Circuit Court of Appeals, however, has ordered that the case be remanded to the District Court *with directions to enter judgment for the defendants.*

## Reasons Relied on for the Allowance of the Writ.

Your petitioner is advised and alleges that the decision of the Circuit Court of Appeals was erroneous and should be reviewed by this Court, in that—

1. The decision is that one injured by reason of a conspiracy in violation of the Anti-Trust laws cannot recover the damages caused by acts in combination pursuant to such conspiracy if such acts, without combination and in the absence of conspiracy, would have been lawful and might or would naturally have been done.

2. The decision is that in order to measure the damages caused by acts done in combination pursuant to such a conspiracy there must be subtracted from all the damage caused such damage as might have lawfully been caused by similar acts not in combination, in the absence of a conspiracy, and in fair competition.

3. The decision is that there can be as matter of law no causal connection between a conspiracy and acts pursuant thereto to accomplish the plaintiff's failure, and the accomplishment of that purpose on the ground that, in the absence

of a conspiracy, by reason of similar acts lawfully done, the plaintiff would have failed.

4. The decision assumes that in the absence of a common understanding and purpose the defendants would have created conditions in trade and commerce in parchment substantially identical in effect with those which were actually caused pursuant to conspiracy—a conclusion which could not have been drawn from the evidence, which was not accepted by the jury, and which disregards the very considerations of policy which were the source of the provisions of the Anti-Trust laws against combinations.

5. The decision constitutes a reversal for error in fact.

6. The decision denies to a person injured by reason of a violation of the Anti-Trust laws the right to recover even nominal damages and its costs.

7. The decision was that judgment should be entered for the defendants below, instead of directing that a new trial should be had.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the First Circuit, commanding that Court to certify and to send to this Court on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 2372, *The Paterson Parchment Paper Company et al., Defendants, Appellants,* v. *Story Parchment Company, Plaintiff, Appellee,* to the end that said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

STORY PARCHMENT COMPANY,
By its Attorney,
EDWARD O. PROCTOR.

# Supreme Court of the United States.

OCTOBER TERM, 1929.

No.

STORY PARCHMENT COMPANY,
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*v.*
THE PATERSON PARCHMENT PAPER COMPANY AND KALAMAZOO VEGETABLE PARCHMENT COMPANY.

## BRIEF IN SUPPORT OF PETITION.

### OPINIONS OF THE COURT BELOW.

The opinions in the Circuit Court of Appeals, the majority opinion having been written by Judge Wilson and the dissenting opinion by Judge Anderson, are not yet reported. They will be found at pages 613 and 621 of the record.

### JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 23, 1930 (R. 629). Jurisdiction of this Court to issue the writ applied for is invoked under section 240 (*a*), Judicial Code, as amended by the Act of February 13, 1925.

### STATEMENT OF THE CASE AND SPECIFICATIONS OF ERRORS.

The summary statement of the matters involved in the case already given in the petition contains in brief form all

that is material to the consideration of the questions presented. The statement of the reasons relied on for the allowance of the writ shows the errors intended to be urged. In the interest of brevity they are not reiterated at this point.

ARGUMENT.

The writ prayed for should issue.

*1. The exact questions presented have not been settled by this Court. It is important that they should be.*

There is no decision in this Court upon the question how the damages suffered in an illegal price war are to be measured. There is, indeed, little or no authority upon the question elsewhere, as might be expected, since at common law price wars, whether carried on by a combination or individuals, were not illegal and the damage suffered was *damnum absque injuria.*

If the doctrine of the Circuit Court of Appeals is accepted, that is, that the only damages recoverable are those which it is certain could not have been caused lawfully, and that the Court must assume that substantially identical damages would have been so caused, a plaintiff can never recover damages as the result of an illegal price war.

The decision leads to this curious construction of the statute, that what was at common law *damnum absque injuria* becomes, when prohibited by statute, *injuria sine damno.*

The principles made the basis of the decision, moreover, are applicable to all cases of injuries under the Anti-Trust laws caused by acts otherwise lawful, and to all cases of damage caused by acts usually privileged, but wrongful in the particular case, and the decision will be cited as an authority in such cases.

The question, also involved, whether, if the plaintiff sues under the Anti-Trust laws and proves some damage, but

fails to show with reasonable certainty in what amount, a verdict should be directed for the defendants, has never been determined by this Court, nor, so far as we know, by any Circuit Court of Appeals.

*2. The decision below is contrary to and in conflict with the principles laid down in the decisions of this Court and supported by the great weight of authority.*

*A. Damage may be caused by acts pursuant to an unlawful conspiracy, even though the consequences of such acts are no different from those which might or would have occurred in the absence of a conspiracy.*

The question which, in the opinion rendered by the majority of the Court below, is said to be decisive of this case is whether there was evidence that any damage, or any measurable damage, was caused to the plaintiff by what was done by the defendants.

It must be clear, however, that the Court regarded this question as one quite different in substance from the question whether what was done by the defendants had any effect, adverse or otherwise, upon the plaintiff. There is and could have been no doubt that the plaintiff was hurt by what was done.

The real question, therefore, which the Court decided was whether the plain consequences of what was done by the defendants to the plaintiff were *damage* to it.

The problem must have appeared to the Court somewhat in this form:

What damage results from acts lawful in themselves but made unlawful because of their purpose?

The majority answered this question by saying that only such consequences to the plaintiff as would not have resulted except for the existence of the wrongful purpose are damage.

When it then occurred to them that, but for the existence of the purpose, there would have been no combination, nor the added power which a combination is supposed to have, they disposed of that suggestion by saying that they could see that in the particular situation presented the existence of a combination made no difference; the things done would have been done anyway, in the absence of an unlawful purpose, or at least such substantially similar things would have been done as to make the difference between what was done and what would have been done (the damage, in their view) conjectural.

Now the plaintiff had claimed that the defendants and West Carrollton Parchment Company had by concerted price reductions created an artificial level of prices below fair and reasonable prices, that is, below such prices as would have been fixed by the play of varying supply and demand in the absence of manipulation, and below cost, and that it had been compelled to sell at the reduced prices; that thereby its revenue had been diminished; that by this means and by the concerted efforts of the conspirators to prevent it from acquiring any part of the trade in parchment it had been compelled to discontinue business and the value of its property had been depreciated.

Grant that, say in effect the majority, for there was evidence of it. But how has the plaintiff been damaged by the conspiracy? All that has happened might have happened in the absence of a conspiracy, and we can see that it would have happened.

Is the position of the Court sound or does it accord with established principles? We believe that it is clearly erroneous.

Damage is caused by overt acts, not by purpose or intention, or common purpose or conspiracy. A mere conspiracy without acts following it can damage no one. Though the public may complain in criminal proceedings, such a conspiracy affords no one a civil remedy.

Damage may be caused by acts which are lawful, in which case it is known as *damnum absque injuria.* It has always been recognized that the effect of the competition of one person upon another's business may be damage, though it is *damnum absque injuria.*

Year Books, 11 H. 4, 47:

"Dampnum puit estre absque injuria, come si j'ay un Molyn, et mon vicine leve un auter Molyn, peront le profite de mon Molyn est diminish, j'aver nul action vs. luy, uncor il est damage a moy."

*Keeble* v. *Hickeringill,* 11 Mod. 131:

Holt, C.J.: "It is true, there may be a dammum sine injuria. If a man set up the same trade as mine in the same town, this is a damage to me, but it is sine injuria; for it is lawful for him to set up the same trade if he please."

*Mogul Steamship Co.* v. *McGregor,* 23 Q.B.D. 598, 613:

"The acts of the defendants which are complained of here [price reductions], were intentional, and were also calculated, no doubt to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse."

*Commonwealth* v. *Hunt,* 4 Metc. 111, 134:

"Suppose a baker in a small village had the exclusive custom of his neighborhood, and was making large profits by the sale of his bread. Supposing a number of those neighbors, believing the price of his bread too high, should propose to him to reduce his prices, or if he did not, that they would introduce another baker;

and on his refusal, such other baker should, under their encouragement, set up a rival establishment, and sell his bread at lower prices; the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved, that the purpose of the associates was to diminish his profits, and thus impoverish him, though the ultimate and laudable object of the combination was to reduce the cost of bread to themselves and their neighbors. The same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition, that the best interests of trade and industry are promoted. It is scarcely necessary to allude to the familiar instances of opposition lines of conveyance, rival hotels, and the thousand other instances, where each strives to gain custom to himself by ingenious improvements, by increased industry, and by all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.

"We think, therefore, that associations may be entered into, the object of which is to adopt measures that have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment."

*Vegelahn* v. *Guntner*, 167 Mass. 92, 106:

". . . it has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin someone already there, and succeeds in his intent. In such a case he is not held to act

'unlawfully and without justifiable cause,' as was alleged in *Walker* v. *Cronin* and *Rice* v. *Albee*. The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged."

The acts pursuant to a conspiracy to violate the Anti-Trust laws are themselves unlawful, no matter how innocent they might be when done by one.

*Swift & Co.* v. *United States*, 196 U.S. 375, 396:

"It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

*Aikens* v. *Wisconsin*, 195 U.S. 194, 206:

"The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law;" quoted in—

*Loewe* v. *Lawlor*, 208 U.S. 274, 299.

When by statute acts otherwise lawful are made unlawful because done pursuant to a prohibited conspiracy, no change in the actual consequences of the acts is produced. The acts still cause the same results, the same damage. What the statute does is to remove the privilege under which they were formerly shielded. It should follow that what was *damnum absque injuria* is now recoverable damage.

Of course it is not claimed that all losses suffered by the plaintiff are damage recoverable from the defendants. They are undoubtedly not responsible for conditions created by the plaintiff itself or by others. Nor should they be respon-

sible for the consequences of their acts, otherwise lawful, and not within the scope of the conspiracy and pursuant to it.

It is perceived that the entry of the plaintiff into competition with the established companies might have disturbed the existing equilibrium of supply and demand. If the introduction of its production to the market had the effect of reducing prices below fair and reasonable prices, or below a price at which it could sell at a reasonable profit, it would itself be the cause of any damage suffered and not the defendant. In fact, however, it is obvious that the plaintiff's production could have had little effect upon the market when its total production from November, 1927, to October, 1928, 1,733,682 pounds (R. 577), is compared with the total gross production of the other three companies, 38,000,000 pounds (R. 566, 473, 518, 538).

In any event, it was for the jury, having before it evidence of the prices for parchment prevailing over a number of years, of costs of production, of the quantities produced and sold, of the nature and extent of the demand for the product, and the statements of witnesses as to their opinion of what was a fair price, to determine what would be a fair price for the product under natural conditions, and to what extent the acts of the defendants pursuant to the conspiracy had reduced the actual price below a fair price. It was no more difficult for them to do so in this case than in those cases where a combination has increased the market price above a "fair price . . . under natural conditions," and a purchaser at that price has been allowed to recover the overcharge.

*Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U.S. 391, 396.

*Thomsen* v. *Cayser*, 243 U.S. 66, 88.

*Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791, 803.

It was for the jury as well to determine whether the conditions existing in the trade which indisputably resulted in the failure of the plaintiff's business and the subsequent depreciation of its plant were "natural conditions," or were conditions intentionally created by the defendants and West Carrollton Parchment Company in order to destroy the plaintiff. Nor were they bound to assume, as the majority of the Court below did, that, if it were certain that in the absence of a conspiracy similar conditions would have prevailed, the actual conditions were "natural conditions," for which the defendants would be in no wise responsible. It is no defense that conditions causing damage to the plaintiff might have been created under the cloak of the privilege of fair competition, if in fact they were not.

*B. The Court below had no right to assume as a matter of judicial knowledge that, in the absence of a conspiracy, conditions in the trade would have been substantially similar to those actually created by the conspirators.*

We have, under the heading next preceding the above, dealt with the case upon the assumption which we believe that the majority of the Court below made—that in the absence of a conspiracy conditions in the trade would have been substantially similar to those actually created by the conspirators—and pointed out our reasons for believing that, were it justified, it fails to support the decision.

We ought to point out that the opinion does not state the assumption quite as shortly and plainly as we have done; it is cast in a negative rather than a positive form. The opinion states (R. 619):

> ". . . there is no ground on which it can be reasonably inferred that . . . any prices above those actually received, would have prevailed. On the contrary, it is, we think, a moral certainty, that, according to Nature's first law, each of the three old companies, if no com-

bination had existed, in order to hold their trade would at least have met every reduction in price made by the plaintiff to gain trade if they did not openly reduce their prices below the prices fixed by the plaintiff, as independently they lawfully could do. That the defendants would, independently of each other, act upon this rule of self preservation, is not mere conjecture, but a rule of action of which the courts often take cognizance."

In a few words, the position of the majority was that there was no evidence that anything that happened would not have happened anyway.

We think, however, that the jury were justified in believing that, but for the combination, conditions in the trade would have been quite different. It is natural that each company in business should endeavor to obtain as large a share of the trade as possible at a fair price yielding a reasonable profit. It is not to be expected, on the other hand, that a company will manufacture goods to sell them at a loss. It does not seem to us proper even to guess, much less to assume, as the majority of the Court below do, that each company, acting independently, would have been so moved by a desire to eradicate the competition of the new company as to precipitate a price war in which prices would be reduced below cost, or even to a point where no profit could be made. It is to be remembered that the jury were clearly warranted in finding that the reductions in prices actually made by the defendants were below their cost. See the statements in their correspondence (*E.g.*, R. 482, 235, 233, 234, 246, 248, 249, 258, 341, 398, 399, 372, 209, 361, 362, 377, 353, 354, 444, 446, 447).

The jury might well have considered that, had the established companies been acting independently, there was no more reason for each to engage in cut-throat competition with the plaintiff than with any of the others, and that, since

no disposition to do so had been manifested prior to the plaintiff's entry into the field, the fact that a new company had undertaken to compete on a comparatively small scale furnished no occasion for a change in policy by each.

Moreover, the opinion fails to recognize the truth so generally acknowledged, that there is in a combination a power of coercion which does not exist in the individual members thereof.

It may be suggested that the fact that there was a combination against the plaintiff shows that the defendants, in this very case, recognized that they might thereby gain a power which they lacked standing alone. What inner necessity compelled them, otherwise, to meet and to agree that their reductions in price should be concerted?

The Anti-Trust laws themselves show that Congress perceived that there was a danger in combinations which did not exist where competitors acted independently. We do not believe that a Court has the right to deny effect to the statute by saying that in a particular case Congress was mistaken and that what the combination did in the case before it was nothing more than would have been done without understanding or preconcerted plan; certainly a Court should not do so without evidence and merely as a matter of judicial knowledge.

Nor does the fact that the established companies might, conceivably at least, have done independently what they did in concert make the plaintiff's damages conjectural. Damages do not become conjectural because it may be conjectured that they might have been caused in some other and lawful way.

For an able criticism of the conclusion of the majority on this point we refer to the dissenting opinion of Judge Anderson. We quote from it the following:

> "The conclusion is (to repeat) that, without the defendants' conspiracy to put the plaintiff out of busi-

> ness, it would have died anyway. The logic is, in that regard, hardly distinguishable from setting up the mortality of all human beings as a defense to an indictment for manslaughter or murder. The undeniable facts are that the defendants conspired to kill the plaintiff and the plaintiff died. The majority opinion is to the effect that the conspiracy was unnecessary; that the plaintiff would have died anyway. I do not assent to such reasoning or its results" (R. 626).

*C. The plaintiff was at least entitled to recover nominal damages and its costs.*

It may be granted that the gist of an action at law under the Anti-Trust laws is damage, and that a plaintiff may not have a verdict unless it shows damage.

Even the opinion of the majority of the Court below, however, recognized that the evidence showed some damage to the plaintiff. It must be clear indeed, on any view of the case, that the carrying on of a price war against the plaintiff was bound to result in some damage to it.

The ground of the Court's decision below is that there was—

> "a lack of proof that by reason of the alleged unlawful acts of the defendants it has suffered damages through what is termed 'loss of profits,' which can be measured and expressed in figures that are not based on speculation and conjecture . . ."

But it is certainly the general rule that, where it appears that actual damage has been sustained, but there is not evidence sufficient to enable the amount thereof to be ascertained, the plaintiff is yet entitled to recover nominal damages.

*United States* v. *Mock*, 149 U.S. 273.
17 Corpus Juris, 725, and cases cited.

It is submitted that the rule is applicable to an action at law under the Anti-Trust laws.

The matter is of some importance because nominal damages carry costs which, in an action under the Anti-Trust laws, include a reasonable attorney's fee.

*D. The Circuit Court of Appeals had no power to order judgment for the defendants below.*

Of course the Court below had no power to order a judgment for the defendants unless by reason of the fact that the jury rendered an alternative verdict and consented that, if as a matter of law the plaintiff was not entitled to a verdict, a verdict might be entered for the defendants (R. 13, 605).

> *Slocum* v. *New York Life Insurance Company*, 228 U.S. 364.

Whether a jury may be required to return an alternative verdict, in the form in which it was done in this case, in view of the Seventh Amendment, has never been passed upon by this Court, although in *Northern Railway Co.* v. *Page*, 274 U.S. 65, the practice was assumed without discussion to be valid.

The practice has been adopted in the District of Massachusetts under the Conformity Act, from the practice in the state Courts of Massachusetts under a state statute (Massachusetts General Laws, c. 231, sec. 120).

> *Automatic Pencil Sharpener Co.* v. *Boston Pencil Pointer Co.*, 279 Fed. 40.

The practice was unknown at common law at the time of the adoption of the Federal Constitution. In the exhaustive review of the modes and forms of trial by jury in *Slocum* v. *New York Life Insurance Co.*, *supra*, no reference was made to any such practice. As that case decided that the Seventh Amendment safeguarded the right to trial by jury

as it existed at the time of the Constitution and that final judgment could not be ordered on reversal by the reviewing court under a state statute where it was decided that there was no evidence for a jury, the practice seems clearly to conflict with the constitutional guarantee.

In any event the Circuit Court of Appeals had power under the terms of the verdict only to order that the verdict now be entered for the defendants. It did not have power to order judgment and thereby deprive the plaintiff of the right to move for a new trial or to prosecute its exceptions, and, if it should obtain a new trial, to supply other evidence of its damages.

## Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the First Circuit and finally reverse it.

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# Supreme Court of the United States.

October Term, 1930.

## No. 57.

**Story Parchment Company,**
Petitioner,

v.

**The Paterson Parchment Paper Company**
**and**
**Kalamazoo Vegetable Parchment Company.**

## BRIEF FOR THE PETITIONER.

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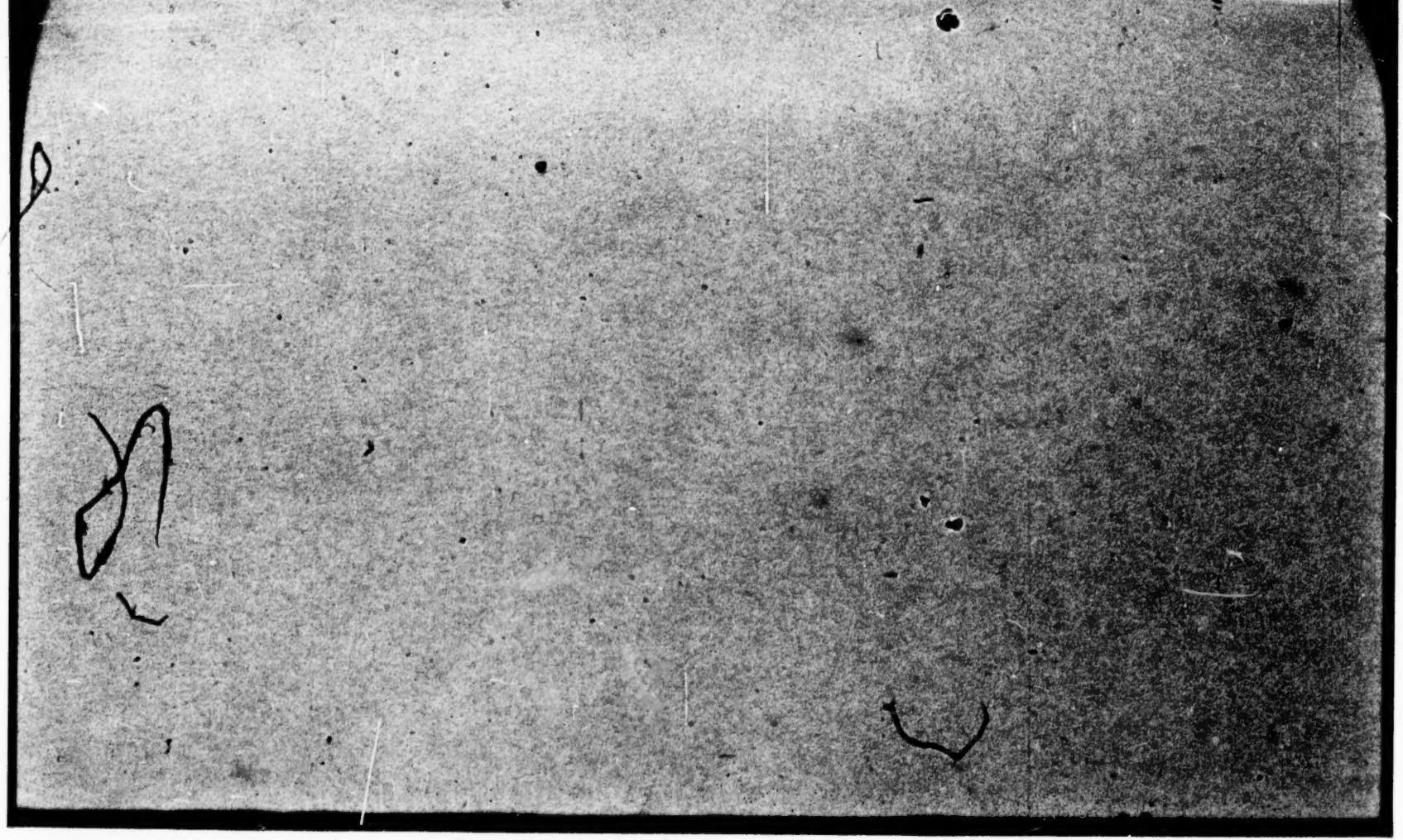

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